

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Review of the Commission's
Regulations Governing Broadcast
Television Advertising

MM Docket No. 95-90

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To: The Commission

COMMENTS OF CHRIS-CRAFT INDUSTRIES, INC.

Chris-Craft Industries, Inc. ("Chris-Craft"), which owns the United Paramount Network ("UPN") through its subsidiary BHC Communications, Inc., hereby presents the following comments in this rule making proceeding. Chris-Craft submits that, regardless of whether the Commission adopts a full repeal of Section 73.658(i) of its rules (the "network advertising representation" rule) -- a proposal as to which Chris-Craft expresses no position -- it should eliminate the applicability of the rule to new networks such as UPN.

Given the inherent competitive disadvantages of new networks and of many of their weaker affiliates, such networks and their affiliates in particular need maximum flexibility in negotiating the terms of their relationship, the kinds of services that the network will provide, and the ways in which each can derive economic benefit from the relationship. By prohibiting a new network and its affiliates from agreeing to allow the network to serve as the affiliates' national sales representative, the network advertising representation rule unnecessarily interferes with their relationship by prohibiting an affiliate from obtaining the

economies and benefits which it could otherwise derive from the network relationship. The rule also unnecessarily prohibits the network entity from a potential source of revenue which could be derived from sales representation services. The result is weaker affiliates and a weaker network, with no benefit to the public interest.

I. INTRODUCTION

A. Description of Chris-Craft and UPN

Chris-Craft, through its subsidiaries BHC Communications, Inc. ("BHC") and United Television, Inc. ("UTV"), owns and operates eight television stations: WWOR-TV, Secaucus, New Jersey; KCOP(TV), Los Angeles, California; KBHK-TV, San Francisco, California; KPTV, Portland, Oregon; KMSP-TV, Minneapolis, Minnesota; KMOL-TV, San Antonio Texas; KUTP(TV), Phoenix, Arizona; and KTVX(TV), Salt Lake City, Utah.

Chris-Craft owns UPN, which is a national broadcast television network which premiered on January 16, 1995. UPN currently has 145 affiliates, of which 79 are primary affiliates and 66 are secondary, reaching more than 90 percent of all U.S. television households. ^{1/} It currently offers four hours of prime time programming per week: Monday and Tuesday evenings from 8 to 10 p.m. (ET/PT). In addition, UPN broadcasts a weekend movie Saturday afternoons

^{1/} These figures are based on September 1994 Nielsen Station Index ("NSI") Television Household Estimates. They include newly signed affiliates, some of which may not yet be airing UPN programs.

from 12 to 2 p.m. (ET/PT) and is scheduled to premiere an hour of children's programming on Sunday mornings from 10 to 11 a.m. (ET/PT) this Fall. The network also plans to offer a third evening of programming beginning in March 1996.

UPN obviously faces extensive competition from four larger competitors in the national networking business. In contrast to UPN's limited affiliate base and program schedule, ABC has 226 affiliates, offers 86 hours of weekly programming, including 22 in prime time, and has coverage of 99% of U.S. households. NBC has 221 affiliates, offers 95 hours of weekly programming, of which 22 are in prime time, and has 99% coverage. CBS has 218 affiliates, offers 87 hours of weekly programming, of which 22 are in prime time, and has 99% coverage. And Fox has 201 affiliates, offers 38 hours of weekly programming, of which 15 are in prime time, and has 98% coverage. 2/

In addition to competing with these other broadcast television networks, UPN competes in varying degrees for programming, audience and national network advertising dollars with numerous national cable television networks, such as USA, TNT, Discovery Channel, A&E, and Lifetime. Most of these networks offer full schedules, seven days a week, 24 hours a day.

2/ The figures for ABC, NBC, CBS and Fox are based on 1994-95 season-to-date Nielsen Television Index ("NTI") averages.

II. NATIONAL SALES REPRESENTATION OF AND BY CHRIS-CRAFT

Chris-Craft's eight stations, six of which are affiliated with UPN, had between them retained, until recently, the services of 3 separate independent national sales representation firms. However, in the Spring of 1995, in order to meet the national spot sales needs of its stations more efficiently and effectively, Chris-Craft established its own sales representation firm, United Television Sales, Inc. ("UT Sales"). UT Sales, which is a subsidiary of UTV and a separate entity from UPN, commenced acting as national sales representative for each of Chris-Craft's eight stations on July 17, 1995. UT Sales would like the flexibility of being able to represent other UPN affiliates, several of which have already expressed interest in such representation, but is currently prohibited from doing so by the network advertising representation rule.

As a general matter, national sales representatives represent individual stations in connection with their sale of spot advertising time to national advertisers. Such spots may run during availabilities that a network affiliate is entitled to sell during or adjacent to network programs, but most typically are broadcast during and adjacent to syndicated programs and locally produced programs which are broadcast by the affiliate. National sales representatives act for the stations in the sale of time, interfacing directly with national advertisers and their advertising agencies, and provide related research and marketing advice. National sales representatives may occasionally give advice to their clients concerning programming and pricing strategies, but they typically do not play a

major role in either the selection or scheduling of programming or the pricing of national spots.

III. THE BASES FOR THE EXISTING NETWORK ADVERTISING REPRESENTATION RULES

The network advertising representation rule was adopted by the Commission in 1959, following the recommendation of the Barrow Report. Report & Order in Docket No. 12746, 27 FCC 397, 714-15 (1959) ("Network Spot Sales Report & Order"), recon. denied, 28 FCC 447 (1960). As the Commission recognized in its Notice of Proposed Rule Making initiating the instant proceeding (MM Docket No. 95-90, released June 14, 1995 ("TV Advertising NPRM")), the principal reasons for the adoption of the rule were the Commission's belief that there was substantial price competition between national network advertising sales and national spot advertising sales by and on behalf of individual stations; that the price for national spots at individual stations could have a material effect on the price of network advertising; that networks had an inherent conflict of interest between their sale of national network spots and their acting as representatives of individual affiliates in the sale of national spot advertisements; that the network in such a role had an incentive artificially to increase the price of an affiliate's national spots to the detriment of the affiliate's interest in order to promote the sale of national network time; and that such a conflict was contrary to the public interest. Id. at ¶ 8. This belief was in part based on the fact that, in 1959, network sales and station spot sales were the only competing modes for national television advertising. Id.

The Commission was also concerned in 1959, although to a lesser degree, that networks had an unfair competitive advantage over independent national sales representatives in soliciting their affiliates to become their national sales representative. Network Spot Sales Report & Order, 27 FCC at 709-10. This advantage was deemed to be derived from the leverage which the Commission then believed the major networks had over their affiliates by virtue of the benefits offered to the stations by their respective networks. Some had argued that such leverage might unfairly lead or induce the station to select the network as its sales representative over an independent sales representative. Id. The Commission observed that, at that time, there were more than 25 independent national sales representative organizations in 1959, in addition to the sales representative organizations of the national networks. Id.

In 1980, the Commission's staff recommended that the Commission consider repealing the network advertising representation rule. Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Final Report (October 1980) ("Network Inquiry Report") (at 497-99). The staff concluded that a network's relationship with national advertisers and with its affiliates might allow it to lower costs if it were to serve as national sales representative for an affiliate, and that the rule might therefore be raising costs and interfering with the ability of affiliates to find the most efficient way to sell national spots. Id. at 493-494.

The Commission reviewed the Network Inquiry staff's recommendation in a rule making proceeding that had been commenced in 1978, 3/ in which it considered a number of options, including whether to modify the rule explicitly to exclude emerging networks from the scope of the rule. See Further Notice of Proposed Rule making in BC Docket No 78-309, 3 FCC Rcd 2746 (1988). This proceeding was terminated in 1990, with the Commission deciding not to repeal or modify the rule. Network Representation of TV Stations in Network Spot Sales, 5 FCC Rcd 7280 (1990). However, that decision was based not on a determination that the rule was needed to protect the public interest against the potential harms which were feared in 1959 4/, but rather on the fact that the Commission did not want "to disturb too many facets of the industry at the same time," and that it did "not see from the record a great urgency in the need to change the network spot sales rule, particularly in light of the limited degree of interest shown by the networks in expanding their role in the national spot sales market." Id. at 7281. The Commission did not even address the question of whether the rule should be modified explicitly to exclude new networks from the scope of the rule, undoubtedly because there were no new networks emerging at the time and because none had urged such a modification of the rule.

3/ See Memorandum Opinion & Order and Notice of Proposed Rulemaking in BC Docket No. 78-309, 43 FR 45895 (Oct. 4, 1978).

4/ The Commission merely stated that it did not believe "that the weight of the record evidence or our own experience in this area supports a conclusion that there are public interest benefits sufficient to warrant any changes in the rule." 5 FCC Rcd at 7281.

IV. THE RULE SHOULD BE ELIMINATED FOR NEW NETWORKS SUCH AS UPN

There are several reasons why the network advertising representation rule should be modified, if not repealed, so that it will not apply to new networks. First, the premises and bases for the rule were never really applicable to new networks. Virtually all, if not all, of the observations in the Barrow Report and the Network Spot Sales Report & Order about networks and network behavior in the national spot sales business were directed specifically at ABC, NBC and CBS. The conclusions in that Report & Order also assumed that the networks had an economic incentive and ability to raise affiliate spot prices in order to support higher prices for network advertising rates and that networks had bargaining leverage over their affiliates to force or induce them, contrary to the affiliates' best interest, to use the network as their sales representative. But none of those conclusions applied or would apply to a new network such as UPN. It should be obvious that UPN's ability to raise its network rates is dependent on the competition from the much larger broadcast networks, and not on the spot rates of its affiliates.

Eliminating the applicability of the rule to new networks would, in fact, do more to promote competition than would leaving the rule in its present form. As noted above, the principal basis for adoption of the rule was to assure that network rates were truly competitive, and were not sustained at artificially high levels by virtue of anticompetitive conduct by network sales representatives in the sale of spot time. But the best way to assure competitive network rates is to

increase competition in the sale of network time. And that goal is accomplished by promoting the development of new networks to compete with the established networks. Eliminating the rule for new networks will further this goal by allowing affiliates and new networks, when deemed in their mutual best interest, to benefit from the efficiencies of representation by the network. Such an arrangement could benefit a new network both directly, by providing an additional source of revenue, and indirectly, by strengthening its affiliates. And a competitively stronger new network will increase competition among broadcast networks.

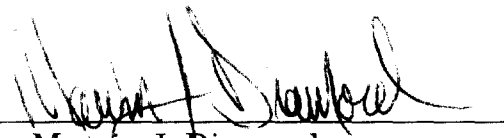
Finally, it should be noted that, in 1959, the Commission was secondarily concerned that allowing networks to represent their affiliates could have an adverse effect on competition among national sales representatives in their seeking clients. But since 1959, there has been a significant consolidation among independent sales representatives and a resultant reduction in competition within that market. Whereas there were more than 25 independent sales representatives in 1959, today there are less than 10. Allowing a new network such as UPN to represent its affiliates will give those affiliates one additional choice in the selection of a national sales representative. That additional choice will spur more competition and perhaps better prices for the affiliate's business, and would benefit such affiliates directly. Thus, contrary to what might have been the case in 1959 or even 1980, freeing new networks from this rule will promote competition among national sales representatives, not impede it

V. CONCLUSION

As discussed above, Chris-Craft submits that there is not and has never been any potential for anticompetitive conduct by a new network in the sale of affiliate spot time. In any event, any perceived potential for such anticompetitive conduct would be more than offset by the benefits to new networks and to their affiliates, and to competition among broadcast networks in the sale of advertising time, from the elimination of the applicability of the rule for new networks.

Respectfully submitted,

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